OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
for
MONTGOMERY COUNTY

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CASE NO. CU 15-06

APPLICATION OF MARYLAND CATERING CO., INC.

ORDER GRANTING MOTION FOR CONTINUANCE OF PUBLIC HEARING AND CONTINUING THE PUBLIC HEARING INDEFINITELY

On March 24, 2015, Maryland Catering Co., Inc. (Applicant) filed an application for a conditional use to permit a Country Inn under § 59-3.5.3.A of the Zoning Ordinance. The subject property is located at 10801 MacArthur Boulevard, Potomac, Maryland 20850, in the R-200 Zone (Tax Account Number 10-00848003).

This Order grants a continuance in the above captioned case until such time that the District Council acts on Zoning Text Amendment 17-04 (ZTA). If the Council fails to act on the ZTA within 6 months of the date of this Order, any party may file a written request with the Hearing Examiner to review whether further continuance of the case is reasonable. All dates in the Scheduling Order dated February 27, 2017 (Exhibit 173), are hereby rescinded, although the limitations on the Applicant's ability to amend the application remain in effect until repealed by a further scheduling order.

Background

A detailed history of this case is included in two Orders Granting the Applicant's Motions to Amend the application (Exhibits 87, 200), which are incorporated herein. For the purposes of this Order, the Hearing Examiner adds that this case has been pending for over two years primarily due to the Applicant's requests for multiple postponements. Exhibit 20, 28, 42, 70, 106. The Hearing Examiner initially denied the Applicant's most recent request for a postponement of a public hearing scheduled for February 24, 2017. Subsequently, however, she granted a continuance to allow the Planning Board an opportunity to make a substantive recommendation in the case.[1] Exhibits 150.5(a), 173. She convened the February 24, 2017, hearing, at which time the parties agreed to a schedule for future proceedings. The Hearing Examiner memorialized this

[1] The Applicant requested a postponement of the February 24, 2017, hearing date because Staff of the Planning Department determined that it could not make a substantive recommendation without additional information. Exhibit 106. When the Hearing Examiner denied the postponement request, Staff issued a report recommending deferral or denial only for that reason. The Planning Board did the same, but requested the opportunity to make substantive comments because of the importance of the property's location adjacent to a national park. Exhibits 131, 150.5.

schedule in a Scheduling Order (Exhibit 173) that set OZAH's public hearing for September 25, 2017, and the Planning Board's public meeting for July 13, 2017. The Scheduling Order also prohibited further amendments to the application, except for those recommended by the Planning Board. Exhibit 200. To aid in bringing the case to conclusion, the Scheduling Order stated:

> No postponement of the September 25, 2017, hearing date will be granted absent *force majeure* or other act outside of the control of the parties.

Id. At the February 24, 2017, public hearing, the attorney for Mr. and Mrs. Francis O'Day, who oppose the application, estimated that OZAH's public hearing would take two weeks.[2] 2/24/17 T. 72.

At present, the Zoning Ordinance defines a country inn as an "establishment for dining in a rural area..." *2014 Zoning Ordinance,* §59-3.5.3.A.1. On June 27, 2017, the District Council introduced Zoning Text Amendment 17-04 (ZTA), to add an "appropriate limitation on what is a rural area." *Analyst Packet,* Agenda Item #4A, June 23, 2017. If adopted, the text amendment will prohibit Country Inns in the R-200 Zone *unless* the property has "one property line abutting R, RC, RNC, or AR zoned property and the abutting property must be at least 2 acres in size." *Zoning Text Amendment 17-04,* Draft 2 (6/14/2017), introduced June 27, 2017. The ZTA is co-sponsored by seven members of the District Council. *Id.*

On the same date, the West Montgomery County Citizens Association, the River Falls Homeowners Association, the Civic Association of River Falls, the Woodrock Homeowners Association and the Brickyard Coalition (collectively, "Associations) filed a Motion for Continuance of Hearing (Motion). Exhibit 210(a). They allege that the ZTA would prohibit this application because the proposed Country Inn does not meet the criteria for abutting properties in the ZTA. *Id.* at. 2. In support of this position, they attached a zoning map showing that properties abutting the subject property are entirely within the R-200 Zone. *Id.,* Exhibit 2. Mr. and Mrs. O'Day filed a response supporting the Motion. Exhibit 214(a).

The Associations assert that the public hearing scheduled for September 25, 2017, should be continued because the ZTA is likely to overtake a final decision in the case, rendering the application moot. Thus, they argue, the public hearing will be "an enormous waste of time, energy and resources." *Id.* at 3. The ZTA is scheduled for a hearing on September 12, 2017. The Associations anticipate that the ZTA may be acted upon by the Council as early as October, 2017. They estimate that OZAH's decision will occur well beyond adoption of the ZTA because the public hearing will take two weeks, the Hearing Examiner will need 30 days to write her report, and there will be a request for oral argument before the Board of Appeals, extending the time needed for final decision (which could include a court appeals as well.) *Id.*

The Applicant filed its response to the Motion on July 5, 2017.[3] Exhibit 214(a). It urges the Hearing Examiner to retain the September 25, 2017, public hearing for several reasons. The Applicant claims that the doctrine of "zoning estoppel" precludes the Council from adopting the

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[2] The Hearing Examiner doesn't necessarily agree with that estimate, but that is irrelevant to this Order.

[3] The Associations' Motion included a request to shorten the Applicant's time to respond to July 5, 2017. The Applicant agreed to this request. Exhibit 210(a), 213.

ZTA. *Id.* at 12-15. It believes that a public hearing in the case is needed for OZAH to "fulfill its role as an advisor to the District Council in land use matters." *Id.* at 1. Similarly, the Applicant feels it's necessary to hold both the Planning Board meeting and OZAH's public hearing to educate the District Council before it acts on the ZTA. *Id.* at 5. Without the public hearing, the Applicant contends that its only input on the ZTA will be a 3 – 6 minute time period allotted for speakers at the Council's public hearing on the ZTA. The Applicant also contends that the ZTA contradicts the intent of the 2014 Zoning Ordinance, which made country inns a conditional use rather than requiring a rezoning application. They reason that the ZTA would "bestow[s] on the District Council the ability to determine whether the country inn proposed in Application No. CU 15-06 should ever be approved, a right it relinquished..." in the 2014 Ordinance. *Id.* at 3. Finally, the Applicant asserts that a continuance will prejudice its "due process interests." *Id.* at 4-5.

The Associations filed a reply to the Applicant's response. They argue that the test for zoning estoppel asserted by the Applicant is no longer the law in Maryland. They also believe that the Applicant has ample opportunity to educate the County Council and may lobby on the ZTA. The Hearing Examiner retains the ability to decide conditional use cases, they argue, because the ZTA is a law of general applicability and does not decide individual cases. Mr. and Mrs. O'Day supported the Associations' reply.

Opinion

Section 59-7.6.3.B.a.1 of the Zoning Ordinance permits the Hearing Examiner to continue a case to a "time certain" or for a "reasonable time" when:

> ...the Hearing Examiner finds that the pendency of any proposed master plan, plan amendment, highway plan, capital improvement program, zoning or planning study, zoning text amendment, pending court case, or other relevant matter may substantially affect the application under consideration...

The law in effect at the time a conditional use case is decided governs the decision unless the applicant has acquired constitutionally protected "vested rights" in the application. *Powell v. Calvert County,* 368 Md. 400, 409 (2002). Property rights in a zoning approval do not vest until a final decision approving the application has been made and "recognizable construction" has begun. *City of Bowie v. Prince George's County,* 384 Md. 413, 428 (2004); *Prince George's County, Md. v. Sunrise Dev. Ltd. P'ship.,* 330 Md. 297, 314 (1993). As neither factor exists here, the Applicant does not have vested rights in the application that would protect against substantive changes in the law.[4]

Short of vested rights, the Applicant argues that the doctrine of zoning estoppel precludes a continuance, relying on a 3-part test stated by the Court of Special Appeals in *Relay Imp. Ass'n v. Sycamore Realty Co., Inc.*, 105 Md. App. 701, 736, 661 A.2d 182, 199 (1995), *aff'd sub nom. Sycamore Realty Co., Inc. v. People's Counsel of Baltimore County*, 344 Md. 57, 684 A.2d 1331

[4] The Applicant does not contend that it has vested rights in the proposed use. Exhibit 214(a).

(1996).[5] Zoning estoppel is "the theory of equitable estoppel applied in the context of zoning disputes." *Baiza v. City of College Park,* 192 Md. App. 321, 334-335.

The Applicant's argument fails for several reasons. First, the 3-part test enunciated in *Relay* is no longer the law in Maryland. *Sycamore Realty Co. v. People's Counsel of Baltimore County,* 344 Md. 57, 68 (1996). In *Sycamore,* the Court found the *Relay* test was "incompatible with Maryland's vested rights rule." *Id.* at 68. Maryland courts have never adopted the zoning estoppel doctrine, although they recognize that it might be applied when "the developer's good faith reliance on government action in the pre-construction stage is so extensive and expensive that zoning estoppel is an appropriate doctrine to apply." *Maryland Reclamation Associates, Inc. v. Harford County,* 414 Md. 1, 57 (2010). Estoppel may *not* occur if the applicant has "good reason to believe" before acting to his detriment that the "official's mind may soon change." *Id.* at 58. Among the facts that may alert an applicant to a possible change in law is strong public opposition to the approval. *Id.* at 59.

Courts uniformly caution that zoning estoppel should be applied sparingly because courts "cannot ignore a local government's responsibility to its residents..." *Baiza v. City of College Park,* 192 Md. App. 321 (2010). Since *Sycamore,* no Maryland court has actually invoked zoning estoppel to preclude government action. *See, e.g., Maryland Reclamation Associates, Inc. v. Harford County,* 414 Md. 1 (2010)(change in laws); *Baiza v. City of College Park,* 192 Md. App. 321 (2010)(reservation of property); *Frapple, L.P. v. Commissioners of Town of Rising Sun,* CIV. WDQ-10-0018, 2012 WL 835604, at *11 (D. Md. Mar. 8, 2012)(When facts are available to the developer that "should have alerted [it] to the real possibility that its plans ... would not come to fruition," estoppel is not justified.)

The facts here are far from enough to support a claim for zoning estoppel under Maryland law. The Applicant has not presented any unusual or extensive expenses in prosecuting the case thus far. While the application has been pending for over two years, the primary cause has been the Applicant's non-responsiveness to requests for information from Planning Staff. Exhibits 23, 38, 48. Real progress on the application did not begin until August, 2016. As the Hearing Examiner pointed out at the public hearing, if the Applicant had filed the application in August 2016, when it began to respond to Staff's requests for information, a public hearing in February would have been a typical time frame within which to hold a public hearing. 2/24/17 T. 61-62.

In addition, for zoning estoppel to apply there must be some government action upon which the Applicant in good faith relied to his detriment. The record is devoid of affirmative action on the County's part that would have assured the Applicant that its application would be approved. A favorable recommendation from Staff is just that: a recommendation. Were a favorable recommendation from Staff enough to invoke zoning estoppel in every case, it would be unnecessary to proceed with any public hearing in a conditional use case.

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[5] In *Relay,* the Court of Special Appeals held that zoning estoppel could apply where three factors are present: (1) the local government acts, or fails to act, in an arbitrary and unreasonable manner, (2) with deliberate intent to delay construction, and (3) the conduct at issue is the primary and proximate cause of the landowner's inability to vest his or her rights before a change in zoning occurs. *Relay, supra,* at 736.

Finally, Section 59-7.6.2.B.3.a.i of the Zoning Ordinance explicitly places applicants on notice that a quasi-judicial hearing may be postponed or continued if a text amendment is introduced that would affect the application. The policy behind this explicit authority is clearly to permit the Council time to develop legislative policy that can be implemented rather than thwarted. As this authority has been part of the Zoning Ordinance since its adoption, the Applicant had knowledge of the possibility that this could occur, particularly given the extent of opposition to this application.

While the test for zoning estoppel argued by the Applicant is no longer the law in Maryland, many of the factual allegations in its response are misplaced. The Applicant asserts that the only reason for the ZTA is to stop this project because there is no evidence in the record that the country inn at this location will have harmful benefits. This argument ignores the facts that (1) much of the evidence will not be put on until the public hearing on the merits, and (2) there is ample evidence in the record that the proposed inn will cause adverse impacts from noise, traffic, conflicts with pedestrians and bicyclists, and will adversely impact Great Falls National Park. The Hearing Examiner lists only a few of the exhibits entered into the record thus far. Exhibits 21-23, 30, 33, 35, 96.5, 100, 103, 114, 117, 156, 190, 193. The weight of this evidence (and evidence yet to be presented) has simply not been adjudicated yet.

The Applicant asserts that the Council reviewed the zoning issues surrounding country inns during adoption of the 2014 Zoning Ordinance. They allege that reviewing them again now is more evidence of an intent to bar this application. The Hearing Examiner disagrees. Prior legislative review of country inns in 2014 doesn't bar the Council from looking at new issues that may arise. The question of what constitutes a "rural area" has been an issue of contention in the case. Exhibit 104. This case may have brought an unintended result of the prior law to light; the Council may legitimately amend a Zoning Ordinance to clarify its original intent, particularly when the ZTA applies to all similarly situated properties.

The Applicant contends that the Motion for Continuance is a deliberate attempt to prevent the Applicant from acquiring vested rights. The Hearing Examiner does not find this persuasive. First, the Motion for Continuance doesn't constitute government action because it was filed by those in opposition to the case. The Council must act independently to introduce legislation. Second, the Applicant has not been deprived of anything yet. The continuance places only a temporary hold on the Applicant's ability to prosecute the case. Third, the Hearing Examiner may not review Council's actual motives for introducing the legislation; she must focus on objective actions in the case. *Kenwood Gardens Condominiums, Inc. v. Whalen Properties, LLC*, 449 Md. 313, 338, 144 A.3d 647, 662 (2016). The Applicant presents nothing in its argument but pure speculation as to the motives of the District Council for introducing the ZTA.[6]

When the Applicant may not rely on vested rights or zoning estoppel, the Hearing Examiner must balance the competing interests presented by the parties in considering whether to grant a continuance. On balance, the Hearing Examiner finds that the interest stated by the opponents outweigh the interests asserted by the Applicant. While she does not speculate on

[6] The government actions that form the basis of the Applicant's zoning estoppel claim fall far, far short of the facts in cases where the Court of Appeals still refused to apply the doctrine. *See, Maryland Reclamation Associations, supra.*

whether the District Council will ultimately adopt ZTA 17-04 in its current form, she does find that it is very possible that the Council could act on the ZTA prior to a final decision in this case, given the potential for oral argument to the Board of Appeals and subsequent appeals to the courts. Thus, the parties would be put to considerable time and expense participating in a public hearing that could be meaningless. While the Hearing Examiner recognizes that the Applicant has substantially complied with the deadlines included in the Scheduling Order issued in February, 2017, those in opposition have already expended considerable resources over the (more than) two years the case has been pending, mostly due to delays caused by the Applicant and multiple amendments to the conditional use plan.

The Applicant's stated interest in holding the public hearing are not persuasive. The Applicant's primary complaint is that the public hearing is needed to educate the District Council on potential benefits of country inns. The Applicant has many means available to educate the Council on this. The assumption that the Applicant will have only 3 to 6 minutes to present its case is speculative, as it assumes that only the Applicant and the Applicant's attorney will testify at the public hearing. In addition, the Applicant may provide unlimited written testimony to the District Council. Finally, the Hearing Examiner is unaware of any restriction on the ability of the Applicant to meet individually with members of the District Council, although she leaves that determination to the Council and its legislative staff. The Applicant will have the opportunity to make its views known through the legislative process and does not need to incur the time and expense of a quasi-judicial hearing on the parties to inform members of the Council of its position.

In the same vein, the Hearing Examiner disagrees that the Planning Board must hold it's meeting to educate the District Council, although whether to hold its public meeting is up to the Board. The short answer to this is that the Zoning Ordinance requires the both Planning Staff and the Planning Board to comment on all zoning text amendments prior to the Council's public hearing. The Planning Board may hold a public meeting on the ZTA prior to issuing its comments. *Zoning Ordinance,* §59-7.2.4.C.2. Thus, the Applicant has the opportunity to make its views known to both Staff and the Planning Board. The District Council will have the benefit of the Planning Board's opinion on the matter.

The Hearing Examiner does not find that a continuance contravenes the intent of the 2014 Zoning Ordinance. A final decision on a conditional use application remains with the Hearing Examiner, or if oral argument is requested, with the Board of Appeals. The ZTA enacts legislative policy (i.e., to clarify the term "rural" as currently used in the Zoning Ordinance), is applicable to all similarly situated conditional uses for country inns, and is well within the realm of the Council's legislative authority to determine what uses are compatible. While it has an impact on this particular case, the Council has not taken back the authority to approve or deny individual conditional use applications.

Nor would a continuance be contrary the Hearing Examiner's February, 2017, Scheduling Order. A prior scheduling order does not bind the Hearing Examiner from exercising her authority under the Zoning Ordinance to continue a case in light of new facts. Here, a continuance is consistent with the purpose of the Scheduling Order. The Scheduling Order was intended to provide those in opposition some repose from the time and expense incurred by having to review repeated amendments to the conditional use plan while at the same time allowing changes recommended by the Planning Board. It makes no sense that the Hearing Examiner would impose

the additional burden on those in opposition to participate in a fruitless public hearing. Nor does the language in the Scheduling Order support the Applicant's position. Those in opposition do not "control" the members of the District Council, who act independently to introduce a zoning text amendment.

The Applicant argues that OZAH must hold a quasi-judicial public hearing to "fulfill its role as an advisor to the District Council in land use matters." Exhibit 214(a), p. 1. The Zoning Ordinance does authorize OZAH to advise on Zoning Text Amendments, but that role is discretionary.[7] *See, Zoning Ordinance,* §59-7.2.4.C.3. Neither the Montgomery County Code nor the Zoning Ordinance contain any requirement that OZAH hold a quasi-judicial hearing to fulfill this function. OZAH's primary mission is to conduct fair and impartial quasi-judicial public hearings. The fairness of the public hearing could easily be impaired if OZAH advocated for substantive policy on a zoning text amendment that affected a pending case. Even when it provides advice on zoning text amendments that do *not* affect a pending case, OZAH generally does not comment on substantive legislative policies.

The Zoning Ordinance permits the Hearing Examiner to continue a hearing to a date certain or a "reasonable time." The "reasonable time" here would be a realistic time for the Council to complete its normal legislative process. Thus, the Hearing Examiner will continue the public hearing until such time that the Council adopts the ZTA. If the Council has not adopted the ZTA within six months, any party may request that the Hearing Examiner rule on whether further delay is reasonable in the case.[8]

This Order serve as notice to all those entitled to notice of the original public hearing of the indefinite postponement of the public hearing in this case.

Therefore, upon consideration of the Associations' Motion for Continuance, responses from Mr. and Mrs. O-Day and the Applicant, and replies from the Associations and Mr. and Mrs. O'Day, it is hereby,

ORDERED, that the public hearing currently scheduled for September 25, 2017, is continued indefinitely until such time that the District Council acts on ZTA 17-04, and it is further

ORDERED, that if the Council has not acted on the ZTA 17-04 within 6 months of the date of this Order, any party may request the Hearing Examiner to determine whether additional delays are reasonable; and it is further

ORDERED, that the remaining deadlines included in the February 27, 2017, Scheduling Order are no longer in force or effect, and it is further

ORDERED, that the limitations on the Applicant's ability to amend the application, set forth in the February 27, 2017, Scheduling Order, remain in full force and effect until a revised Scheduling Order is issued that permits additional amendments.

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[7] Section 59-7.2.4.C.3 states, "The County Executive, the Board of Appeals, or the Hearing Examiner may submit and make publicly available any recommendation on a Zoning Text Amendment to the District Council."
[8] Both the Council and the Planning Board recess for the month of August, 2017.

Issued this 10th day of July, 2017.

Lynn A. Robeson
Hearing Examiner

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Abutting and Confronting Property Owners
(or a condominium's council of unit owners or renters, if applicable)
Civic, Renters' and Homeowners' Associations within a half mile of the site
Any Municipality within a half mile of the site